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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDY GOMEZ,

Defendant and Appellant.

B216748

(Los Angeles County
Super. Ct. No. BA319768)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Ronald Rose, Judge. Affirmed as modified.

Larry Pizarro, under appointment by the Court of Appeal, for Defendant
and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General,
Lawrence M. Daniels and William H. Shin, Deputy Attorneys General, for Plaintiff and
Respondent.

Defendant Andy Gomez was convicted of three firearm-related offenses following a court trial. He was sentenced to an aggregate state prison term of four years. On appeal, Gomez contends the trial court should have stayed sentences on two of the counts.¹ We modify the sentence and otherwise affirm the judgment.²

FACTUAL AND PROCEDURAL BACKGROUND

1. The Charges

Gomez was charged by information with possession of a firearm by a felon (Pen. Code, § 12021, subd. (a)(1)³; count 1), possession of ammunition by a felon (§ 12316, subd. (b)(1); count 2) and carrying a loaded unregistered firearm (§ 12031, subd. (a)(1); count 3).

As to all counts, the information specially alleged Gomez committed the offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(A)), had previously suffered two serious or violent felony convictions within the meaning of the “Three Strikes” law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)), and had served four separate prison terms for felonies (§ 667.5, subd. (b)).

¹ Pursuant to *People v. Mooc* (2001) 26 Cal.4th 1216, Gomez also requested that we examine the transcript of the in camera hearing conducted after his *Pitchess* motion (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) was granted. Here, upon finding Gomez had demonstrated good cause to discover information in two officers’ personnel and administrative records pertaining to “dishonesty, and the fabrication of evidence,” the trial court granted Gomez’s motion and reviewed the potentially responsive documents in an in camera proceeding outside the presence of all persons except the custodian. We have reviewed the sealed record of the in camera proceeding and conclude the trial court appropriately exercised its discretion in ruling on the material to be disclosed. (See *Mooc*, *supra*, 26 Cal.4th at p. 1229.)

² The parties agree the abstract of judgment should be corrected to reflect the trial court’s imposition of a \$20 court security fee on each count, or a total security fee of \$60. (Pen. Code, § 1465.8, subd. (a)(1).) We shall correct this clerical error. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

³ Statutory references are to the Penal Code.

2. Trial Proceedings

Gomez pleaded not guilty and denied the special allegations. He thereafter waived his right to jury trial and agreed to a court trial. In the middle of the proceedings, the trial court declared a mistrial and reinstated Gomez's right to jury trial. Gomez again waived his right to jury trial in favor of a court trial. The parties agreed to submit the matter on the transcript of the first trial.

3. Summary of Trial Evidence

On the night of March 28, 2007, three police officers were patrolling a housing project in Los Angeles when they encountered Gomez, a convicted felon, walking with a companion. Gomez was not a resident of the project and had been previously warned by police to stay away from the area. Officers shone a spotlight on Gomez and his companion, who began to run. Two of the officers pursued Gomez.

During the chase, Gomez removed a nine-millimeter Luger pistol from his waistband and threw the weapon into some plants. Moments later, Gomez also tossed a gun magazine containing nine-millimeter bullets. Gomez was arrested. The pistol was found to be unregistered.

4. Trial Court Findings and Sentence

The trial court found Gomez guilty of all three counts, found not true the gang allegation, and found true one of the prior strike conviction allegations. Gomez was sentenced to an aggregate state prison term of four years, consisting of the middle term of two years on each count, doubled under the Three Strikes law, and to be served concurrently to each other.

DISCUSSION

Gomez contends he was sentenced in violation of section 654, which prohibits punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of conduct.⁴ (*People v. Latimer* (1993) 5 Cal.4th 1203,

⁴ Section 654 provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the

1216; *People v. Harrison* (1989) 48 Cal.3d 321, 325.) Specifically, Gomez maintains the concurrent sentences imposed on counts 2 and 3, possession of ammunition by a felon and carrying a loaded unregistered firearm, should have been stayed because they arose from the same objective and underlying conduct as count 1, possession of a firearm by a felon.⁵

Whether section 654 applies in a given case “depends on the intent and objective of the actor” (*Neal v. State of California* (1960) 55 Cal.2d 11, 19; *People v. Latimer, supra*, 5 Cal.4th at p. 1208) and is a question of fact for the trial court, which is vested with broad latitude in making its determination. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312; *People v. Herrera* (1999) 70 Cal.App.4th 1456, 1466.) Its findings will not be reversed on appeal if there is substantial evidence to support them. (*Hutchins*, at p. 1312; *Herrera*, at p. 1466.)

1. *The Sentence on Count 3, Carrying a Loaded Unregistered Firearm Must Be Stayed*

The People cite *People v. Harrison* (1969) 1 Cal.App.3d 115 (*Harrison*) for the proposition that multiple punishment is permissible for possession of a firearm by a felon and carrying a loaded unregistered firearm. In *Harrison*, a loaded handgun was recovered from underneath the passenger seat of a car driven by the defendant. Substantial evidence indicated the defendant was aware of the gun’s presence, and at least had constructive possession of the weapon. (*Id.* at pp. 118-119.) The defendant in *Harrison* was convicted of two of the same offenses as Gomez—possession of a firearm by a felon and carrying a loaded unregistered firearm. (*Id.* at pp. 117-118.)

longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.”

⁵ The offenses of possession of a firearm by a felon (count 1) and possession of ammunition by a felon (count 2) carry the same upper term sentence or maximum punishment. The offense of carrying a loaded unregistered firearm (count 3) carries a shorter maximum term or punishment.

In rejecting a claim that section 654 prohibited punishment for both offenses, the *Harrison* court reasoned: “In our case, appellant argues he possessed or controlled but one object, the revolver, and yet was punished for two crimes only because he was an ex-convict driving a car. We note these distinctions: Penal Code section 12021 applies only to a person previously convicted of a felony and who owns or has custody, control or possession of a concealable firearm, loaded or unloaded and whether in a vehicle or not; so long as he owns or has custody, control, or possession of it, such a weapon need not be on his person or in his vehicle. The lesser offense proscribed by Penal Code section 12031, however, applies to any person and to any firearm, concealable or not, but only if it is loaded and he carries it either on his person or in a vehicle. Neither ownership, possession, custody or control is a statutory element in the unlawful carrying of a loaded firearm in a vehicle.

“The two statutes strike at different things. One is the hazard of permitting ex-felons to have concealable firearms, loaded or unloaded; the risk to public safety derives from the type of person involved. The other strikes at the hazard arising when any person carries a loaded firearm in public. Here, the mere fact the weapon is loaded is hazardous, irrespective of the person (except those persons specifically exempted) carrying it.

“The ‘intent or objective’ underlying the criminal conduct is not single, but several, and thus does not meet another of the tests employed to determine if Penal Code section 654 is violated. [Citation.] For an ex-convict to carry a concealable firearm is one act. But loading involves separate activity, and while no evidence shows that appellant personally loaded the pistol, there seem[s] little distinction between loading and permitting another to do so. Thus, two acts, not a single one, are necessarily involved and bring our case outside the prohibition against double punishment for a single act or omission. We therefore hold contrary to appellant’s contentions on this point.” (*Harrison, supra*, 1 Cal.App.3d at p. 122.)

To the extent *Harrison* suggests as a matter of law that multiple punishment is required for the single act of a felon possessing a firearm and carrying a loaded

unregistered firearm, we disagree.⁶ A search for substantial evidence of Gomez’s intent or objective must be undertaken, because whether multiple convictions are part of an indivisible transaction is primarily a question of fact. (*People v. Avalos* (1996) 47 Cal.App.4th 1569, 1583.) We review such a finding “in the light most favorable to the respondent and presume the existence of every fact the trial court could reasonably deduce from the evidence.” (*People v. Jones* (2002) 103 Cal.App.4th 1139, 1143; see *People v. Cleveland* (2001) 87 Cal.App.4th 263, 271 [trial court’s finding of “separate intents” reviewed for sufficient evidence in light most favorable to the judgment].)

In this case, there is no substantial evidence that in committing the offenses, Gomez harbored anything more than the single intent or criminal objective to possess the firearm. The only express evidence of Gomez’s intent was the testimony of the prosecution’s gang expert, who opined that, Gomez, a self-admitted gang member, possessed the loaded Lugar pistol to instill fear, to intimidate the community and to protect his gang territory. Nor is there any evidence Gomez engaged in multiple distinct acts with respect to the firearm. Both offenses necessarily arose out of Gomez’s conduct of discarding the Lugar from his person while being pursued by police. No evidence was presented of Gomez’s criminal conduct with respect to the firearm at any other time.

2. *The Sentence on Count 2, Possession of Ammunition By a Felon, Must Be Stayed*

Gomez relies on *People v. Lopez, supra*, 119 Cal.App.4th 132 to argue the trial court should also have stayed his sentence on count 2, possession of ammunition by a felon. In *Lopez*, the defendant was found in possession of a loaded firearm. (*Id.* at p. 135.) He was convicted and sentenced separately for unlawful possession of a firearm and for unlawful possession of ammunition. (*Id.* at p. 134.) On appeal, our colleagues in

⁶ The reasoning of *Harrison* has not been universally followed. (See *People v. Lopez* (2004) 119 Cal.App.4th 132, 137 (*Lopez*) [§ 654 barred multiple punishment for unlawful possession of a firearm and unlawful possession of ammunition]; *People v. Perry* (1974) 42 Cal.App.3d 451, 456-457 [§ 654 bars multiple punishment for simultaneous offenses of possession of a sawed-off shotgun and possession of a firearm by a felon].)

Division Six reversed the separate sentence for the ammunition offense. “While possession of an unloaded firearm alone can aid a person committing another crime, possession of ammunition alone will not.” (*Id.* at p. 138.) In prohibiting certain individuals from possession either firearms or ammunition, the Legislature intended “to prohibit these persons from combining firearms with ammunition.” (*Ibid.*) “While there may be instances when multiple punishment is lawful for possession of a firearm and ammunition, the instant case is not one of them. Where, as here, all of the ammunition is loaded into the firearm, an ‘indivisible course of conduct’ is present and section 654 precludes multiple punishment.” (*Ibid.*)

The People attempt to distinguish *Lopez* because some of Gomez’s ammunition was not in the Luger pistol, but stored inside a magazine on his person. We do not consider this factual difference to have legal significance. The ammunition that was separate from the firearm, like the ammunition in the firearm, was possessed by Gomez for the same purpose, allowing him to have a loaded firearm for protection and/or intimidation.

Heeding the California Supreme Court’s admonition not to “parse[] the objectives too finely” in a section 654 analysis (*People v. Britt* (2004) 32 Cal.4th 944, 953), we conclude Gomez’s three offenses formed an indivisible course of conduct with the same intent and objective. Accordingly, the sentences on counts 2 and 3 should have been stayed.

DISPOSITION

The two-year concurrent sentences on counts 2 and 3 are stayed pending service of sentence on count 1, such stay to become permanent upon completion of sentence as to count 1. The \$20 court security fee is to be imposed as to each of the three counts for a total of \$60. The superior court is directed to forward an amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.